appointment of a guardian *ad litem* is jurisdictional to a proceeding against an infant actually and physically before the court in a suit instituted before the court to determine the rights of the infant. See 10 ENC. PL. & PR. 630-633; *Langstein Bros.* v. *O'Brien* (1895), 106 Ala. 352, 17 So. 550, 30 L. R. A. 707. If the adoption suit be regarded as a suit *in rem* it is not claimed that the record indicates absence of the infant, or want of any notice by publication. Indeed, the record shows the appearance of J. S., "the only person having the custody and control of said minor, and lawfully entitled to give consent." The judges of the supreme court were agreed that there must be substantial compliance with the requirements of the statute prescribing the procedure in adoption cases, in order to confer jurisdiction on the court; but differed as to whether the present record showed substantial compliance. Such has been the rule in Michigan at least since the case of *Greenvault* v. *Farmers' and Mechanics' Bank* (1847), 2 Douglass 498. The more logical rule, and one more productive of practical justice, is the one adopted by the Supreme Court of the United States, that procedure is not jurisdictional, and departures are waived if not objected to and rectified in the same proceeding. *Cooper* v. *Reynolds*, 77 U. S. 308.

The rule adopted by the Supreme Court of Michigan, that substantial compliance with all the statutory procedural requirements is jurisdictional, defeats its own purpose. The more careful the legislature has been to safeguard the proceeding, the more certain is it that it will be void. The more precautions there are to be observed, the greater the probability that one or more of them will be overlooked or indifferently observed. If it be an administrator's sale, an attachment, a partition proceeding, or any other resulting in property being sold, the greater precaution by the legislature to have notice to all parties and the public, open public bidding, time, place, etc., that the property may be safely kept, and well sold, the more certain will the bidders at the sale be that they are buying only one chance in a dozen or in a hundred of getting title, and will bid accordingly; and thus a purpose of protecting the debtors, heirs, etc., produces their ruin. Ample protection to everyone is secured by enabling them to insist in the proceeding itself that all requirements be observed, with the privilege of waiving compliance when it is burdensome rather than beneficial. Disaster only is the fruit of sustaining collateral attacks. In most instances if the only effect of making objection were to have the defect amended, the objection would not be thought worth the making. J. R. R.

THE POWER OF A PUBLIC SERVICE COMMISSION TO COMPEL THE PERFORMANCE OF A SERVICE WHICH BY ITSELF IS UNREMUNERATIVE.—The Public Service Commission of West Virginia had ordered the appellant to put on passenger service for the accommodation of a small town on one of its branch lines so as to give it adequate connections with the main line of appellant. The case was argued on the theory that the returns from this particular service would not cover the costs thereof, and it appears further that there was some doubt as to whether the total returns on the line from both the service ordered and the existing freight traffic would cover the total costs of the

branch line operations. The court held that these facts did not prove the order of the Commission unreasonable, nor constitute depriving the appellant of property without due process of law; *Chesapeake & O. Ry. Co.* v. *Public Service Commission* (W. Va.), 83 S. E. 286.

The rule announced in the above case seems to be quite generally supported, as the cases cited by the court disclose. In appearance it is a fairly simple rule, and yet any attempt to justify it must lead one inevitably into the most complex considerations of rate-making. It is of course apparent that, in the case of property devoted to productive purposes, the fact that it produces an income is the thing that makes the ownership of it desirable. In the case of property used in ordinary competitive industry any failure to realize this end would in time be followed by the gradual withdrawal of such property from the field in which it had shown itself to be unremunerative. The importance of income in relation to property has received due legal recognition in the rule that whatever regulation prevents the earning of a fair rate of return on the fair value of property devoted to public use, constitutes depriving the owner of his property without due process of law; *Smyth* v. *Ames,* 169 U. S. 466. In order to justify the decision of the court in the above case, therefore, it will have to be shown that the effect of the order in question was not to destroy the income getting qualities of the property in question. But it is evident that, under the admitted facts of the case, this would be impossible, if attention were confined solely to the effects of the order of the Commission upon the branch line upon which it directly operated. The justification of the decision in this and similar cases, therefore, must rest upon the assumption that the branch line is not the unit of property, the income from which is protected by legal rule against reduction beyond the point of a "fair rate of return on its fair value." The consideration of the problem raised by the instant case, therefore, necessarily involves a consideration of the problem of what constitutes such a fair and reasonable "unit property." This, in view of the variety of railroad services, and the fact that some of the property is used in common by all these services and some is devoted solely to specific services, involves a consideration of the legitimacy of separating the various services which railroads perform. The problems of "unit property" and "unit service" are in many cases, therefore, inextricably bound together. The question is: how far have legal rules gone in attempting to solve these problems?

At the very outset it may be said that it has now been definitely established in law that in determining the reasonableness of a schedule of rates for intrastate traffic, there must be a separation of intrastate and interstate traffic. Although in the case of *St. Louis & San Fran. Ry.* v. *Gill,* 156 U. S. 649, the Federal Supreme Court upheld a state court which had made the effect of rates upon the entire line the determining test, rather than the effects upon any particular part thereof, and no distinction seems to have been made between such parts as were within and without the state; *Smyth* v. *Ames,* supra, can be said to have settled the point as it now is. As was said in the case of *Southern Ry. Co.* v. *M'Neill,* 155 Fed. 756, "While a rail-

road is not entitled to earn a profit on every mile of its road, nor upon every article carried by it, nevertheless it is entitled to earn a reasonable profit upon the entire intrastate business in the state." The fundamental reason for the existing rule is undoubtedly to prevent any state from foisting upon its neighbors, through its regulations, the task of supporting in part an industry from which its own citizens derive the benefit. In view of the fact that the economic entity often varies from the political entity, doubts have at times been cast upon the correctness of such a policy. In the case of *Steenerson* v. *Great Northern Ry. Co.*, 69 Minn. 353, for instance, it is said, "It seems to us that there is scarcely any good reason why a railway system should be divided on state lines at all for the purpose of fixing rates." Whatever may be the validity of the economic considerations that underlie this objection, the law must be considered as settled otherwise. A somewhat similar situation is presented in separating the passenger and freight traffics for the purpose of considering each as a unit by itself. In the case of *Penn. R. R. Co.* v. *Phila. County*, 220 Pa. St. 100, the majority opinion of the court held that in determining the question of the confiscatory nature of certain prescribed passenger rates, the passenger rates might be considered separately. A strong dissenting opinion finds its strongest arguments in the difficulty of allocating costs, and in the consideration that the railroad system is a unit, a single entity. The legitimacy of the procedure upheld in this case seems to be assumed tacitly in the argument of the court in the case of *Central Ga. Ry. Co.* v. *M'Lendon*, 157 Fed. 961; see also *M. K. & T. Ry. Co.* v. *Love*, 177 Fed. 493. The argument for the legitimacy of the procedure is thus stated by the Pennsylvania court, "To concede that principle (low passenger rates and high freight rates to make up for it) would permit the legislature to compel the carriage of passengers practically for nothing, though the inexorable result would be that freight must pay inequitable rates that passenger travel may be cheap." In both of the instances thus far given, therefore, the fundamental reason for this division would seem to be to make the consumers of the service pay the costs incurred in supplying them with it. While it may be true that the argument drawn from the difficulty of allocating costs has some force, it cannot be considered decisive for the reason that the principle involved in the procedure of separation is so just that it ought not to be entirely rejected merely because of great difficulties in its application. If the obstacles in the way of its application were insuperable, and no practical approximation could be made, the argument would have almost decisive force. In the light of these considerations, the argument that the railroad is an entity loses its force almost entirely. It may be merely suggested in this connection that there has as yet been discovered no perfect method for the distribution of the joint costs over the interstate and intrastate, and between the freight and passenger divisions. Although it has been severely criticised, and the whole problem as far as its legal solution is concerned is still unsettled, the "extra cost and revenue" theory seems to have been the one most utilized; *St. Louis & S. F. R. Co.* v. *Hadley*, 168 Fed. 317; *M. K. & T. Ry. Co.* v. *Love*, 177 Fed. 493. See also the discussion in the *Minnesota Rate*

Cases, 230 U. S. 352 at p. 462 relative to the equated ton-mile and equated passenger-mile basis.

When we come to the particular type of question raised by the instant case, it may be said that in general the tendency has been to refuse to treat branch lines as separate "property units" and the services rendered by them as separate "service units." In the case of the *I. C. C.* v. *L. & N. R. Co.,* 118 Fed. 613, where excessive rates charged on a branch line were ordered reduced, it was said by the court, "Nor does the fact that the Pensacola & Atlantic Railroad (the branch in question) considered as a separate railroad, fails to pay its expenses, justify the discrimination in rates." An order by a railway commission compelling a railroad company to run a passenger and freight train over the branch road, although admittedly at a loss, was upheld, and the fact of such loss held to be no good defense in *Commonwealth* v. *L. & N. R. Co.,* 120 Ky. 91, 85 S. W. 712. Seldom is any attempt made to find a sound reason for such holdings, at least not by means of any fully reasoned out logic. Emphasis is often laid on the duty the railroad owes to the persons along the branch line. A sound reason for refusing to extend to particular branch lines the principle of separation and considering them as separate units would seem to be found in the difficulty of determining the exact value of the contribution to the general prosperity of the system considered as an entity, of the branches in question considered as feeders for the other parts thereof. In short, there is perhaps more reason for emphasizing the "railroad system as an entity" aspect in this phase of the problem. It must be said, however, that there is a disposition on the part of some courts to refrain from laying down any general principle on this point, and to consider each special case on its own peculiar merits and features.

The final phase of the whole problem presents itself in the question of specific rates. The mere fact that rates on a specific article are such that a proportionate lowering all along the line would result in permitting less than a fair return, is not sufficient to condemn the regulation of the particular rate; *Minn. & St. Louis R. R. Co.* v. *Minnesota,* 186 U. S. 257; see same case in 80 Minn. 191. The test in that instance was made the effect of that particular reduction upon the entire income. An order of a railroad commission compelling connections with another line although it necessitated putting on extra trains, which it was admitted would not pay for themselves, was held not to constitute taking property without due process of law, *Atl. Coast Line* v. *N. Car. Corp. Comm.,* 206 U. S. 1. In *Gulf, C. & S. F. R. Co.* v. *R. R. Comm. of Texas,* 102 Tex. 338, 116 S. W. 795, rates on lumber which it was shown would not cover the cost of transporting that commodity were declared unreasonable. It must be noted, however, that the court places great emphasis upon the fact that lumber formed a large part of the freight traffic, and expressly guarded itself by stating that it did not follow from this decision that the same would be held true in the case of a less important item of freight traffic. While at first this case may seem to be inconsistent with the rule announced in the others given, yet it may be that by its reason the court indicates that after all, the test in its mind was the effect of the

rate upon the general income of the road. In *Atlantic Coast Line* v. *Florida*, 203 U. S. 256, the court indicates that in questions of this type the cost of such transportation is one element to be considered, but also enumerates the effect of the rate change upon the income of the road as an entity. The difficulties connected with any attempt to apply a pure cost theory to particular rates are so apparent and great that they may well justify the court in refusing to extend the principle which it has followed in separating interstate from intrastate, and passenger from freight, traffic, to this type of case.

The question, therefore, of the reasonableness of particular regulations affecting railroads, in so far as they involve the question of incomes for particular parts of the line or particular branches of the service, must always hinge upon the determination of a just and reasonable "service unit" and "property unit." In determining the reasonableness of any such units that may be taken, considerations of the public duties owed by this type of corporation, and of public policy growing out of the relation of this industry to the general industrial situation of the community, are of prime importance. Considerations of practical difficulty in the application of any rule, and of justice among the various groups served by railroads must also have a due share in the decision. In the light of these considerations, it is submitted that the attitude of the courts in the rules thus far adopted, has followed a reasonably sound analysis of the problem, although at times they have been rather inadequate in their statement of the reasons for their rules. H. R.

THE RIGHT OF A STOCKHOLDER TO HAVE A RECEIVER APPOINTED.—In the past the question of the right of a stockholder in a corporation to have a receiver appointed was generally disposed of by the question of whether a court of equity had the power to grant such relief. The courts laid down the general rule that courts of equity had no jurisdiction to appoint a receiver at the suit of a stockholder though he charged fraud, mismanagement, and collusion, upon the ground that to do so would work a dissolution of the corporation and hence accomplish indirectly what they could not do directly, *Decker* v. *Gardiner*, 124 N. Y. 334, 26 N. E. 814, *Neilly* v. *Hill*, 16 Cal. 145, and that the extent of the court's power was to grant an injunction, *Barton* v. *International Fraternal Alliance*, 85 Md. 14, 36 Atl. 658.

But to this general rule there were certain exceptions, the courts recognizing their power to appoint receivers where failure and ruin of the corporation were inevitable, *Ulmer* v. *Maine Real Estate Co.*, 93 Me. 324, or where the objects of the corporation had become impossible of attainment, *People's Investment Co.* v. *Crawford* (Tex.), 45 S. W. 738, or the corporation was no longer a going concern, *Greenleaf* v. *Land and Lumber Co.*, 146 N. C. 506, or where the corporation was insolvent coupled with gross mismanagement of its affairs by its officers as well as misconduct on their part constituting a breach of trust, *U. S. Shipbuilding Co.* v. *Conklin*, 126 Fed. 132, 60 C. C. A. 680. But the power to appoint a receiver over a solvent, going concern was generally denied, *Daniels* v. *District Court*, 33 Colo. 293, 80 Pac. 908.